No. 6401

In the Supreme Court of the United States

THOMAS KIRBY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITIONER'S REPLY BRIEF

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Introduction

Recognizing that no meaningful distinction can be drawn between the instant case and this Court's decisions in *United States* v. *Wade,* 388 U.S. 218 (1967) and *Gilbert* v. *California,* 388 U.S. 263 (1967), the State of Illinois urges that these decisions be overruled. The State concedes that eyewitness identifications are subject to serious dangers and abuses, but contends that the presence of counsel does nothing to alleviate the possible evils inherent in the pre-trial identification process.

In the course of its argument that the confrontation in this case was in the investigatory rather than the accusatory stage, the State reverses its position taken before the Illinois Appellate Court and concedes that petitioner was arrested on suspicion, so that the officers could further investigate the ownership of the property taken from him. (Brief pp. 13-14.) The police, however, have no probable cause to arrest merely on the basis of suspicion. *Henry* v. *United States*, 361 U.S. 98 (1959). The State's candid admission that there was no ground upon which petitioner could have been legally arrested is made for the first time in this Court. Had the State been equally candid below, the Illinois Appellate Court would have reversed petitioner's conviction on the same grounds it reversed the conviction of petitioner's co-defendant, Ralph Bean. *People* v. *Bean*, 121 Ill. App.2d 332, 257 N.E.2d 562 (1st Dist. 1970).

I.

Wade and Gilbert Secure Fundamental Rights and These Decisions Should Not Be Reversed.

Beginning with *Powell* v. *Alabama*, 287 U.S. 45 (1932), the first major case construing the Sixth Amendment right to counsel, this Court has consistently held that counsel is required at all critical stages of the criminal process. In *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), this Court noted that mistaken identification testimony is a major factor contributing to the high incidence of miscarriage of justice and that the accused is not always able to detect the suggestive influences present at the identification confrontation. 388 U.S. at 228-232. These decisions correctly noted that the accused's guilt is for all practical purposes determined at the identification confrontation. 388 U.S. at 229. This Court properly held that the accused is as much entitled to counsel at the identification confrontation as the trial itself. 388 U.S. at 237.*

That *Gilbert* and *Wade* were correctly decided cannot be seriously questioned. The right to counsel is basic under our criminal system. The State of Illinois' suggestion that *Wade* and *Gilbert* be overruled ignores the fundamental policy of the Sixth Amendment that counsel be provided at all critical stages of the criminal process.

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* It is to be noted that in civil law countries the identification confrontation is considered a critical stage in the criminal proceedings. The accused is generally afforded the assistance of counsel and in some countries the confrontations must take place before a judicial officer by means of a formal lineup with a court reporter present. See Murray, *The Criminal Lineup at Home and Abroad*, 1966 Utah L.Rev. 610. And see *United States* v. *Wade*, 388 U.S. at 238, n. 29.

II.

No Meaningful Distinction Can Be Drawn Between Wade and Gilbert and the Case At Bar.

The State of Illinois argues alternatively that even if *Wade* and *Gilbert* were rightly decided, the right to counsel recognized in those cases applies only to post-indictment confrontations. (Brief, pp. 9-23; Cal. Brief pp. 11-15.) The influences to which a witness may be exposed at an identification confrontation and which were recognized in *Wade* and *Gilbert* are all blatantly present in the case at bar.

Under Illinois law, petitioner was entitled to consult with counsel immediately upon his arrest. (Ch. 38, §103-4, Ill. Rev. Stat. 1969; see Petitioner's Opening Brief, p. 2) Although the police had petitioner in custody several hours before Shard arrived, the police failed to advise petitioner of his statutory right to counsel. In the absence of counsel, the following occurred.

The witness Willie Shard was telephoned and told by the police that they had picked up two suspects whom they wanted him to identify. (A. 21, 24, 27.) A police officer was sent to pick up Shard and bring him to the police station. (A. 24.) When Shard arrived at the police station, petitioner and Bean, who are black, were seated at a table in a large squad room between Officers Rizzi and Panepinto. (A. 31, 37.) Shard was asked to pick out the two men. (A. 24) It cannot be doubted that petitioner's guilt was effectively and improperly predetermined as a result of the police station showup. Since no lineup was conducted, no pretense was made to ascertain whether Shard could actually identify petitioner as his assailant. Rather, Shard was merely asked to identify his assailants from a group of four persons which consisted of two police officers and the two defendants. The choice was obvious.

The critical stage of the criminal process insofar as identifications are concerned are not those identifications which occur following indictment. The critical identification occurs at the police station. It is here that the victim is asked for the first time to make the identification. If properly conducted, the victim must objectively pick out his assailant from a lineup. At the trial, the witness has no difficulty in selecting his assailant from those present in the courtroom. In the Criminal Court of Cook County, the witness can choose his assailant from among the following: the trial judge, the jurors, the two prosecuting attorneys, defense counsel, the bailiffs surrounding the defendant, and the defendant himself. The identification is thus made by rote. The only time the victim is put to the true test of whether he can identify his assailant is at the police station long before the formal return of an indictment. If the police station identification process is improperly tarnished, as occurred in the case at bar, the defendant is shorn of any chance of proving his innocence.

It may well be that identification confrontations are more critical than police interrogations of an accused. The accused has no personal control whatsoever regarding the conduct of the proceeding, and once the identification is made, it is virtually impossible to remove the association created in the witness' mind. It is difficult to see how any proceeding could have been more critical to petitioner than the identification showup.

The State argues that the identification confrontation should not be considered a critical stage in the criminal process because lower state and federal courts have distinguished *Wade* and have not required the presence of counsel at grand jury proceedings, interviews by the police with State witnesses and photographic identifica-

tions. (Brief, pp. 24-30; Cal. Brief, pp. 10-11.) This Court has not precisely considered whether counsel is required in the three instances raised by the State, but the facts in those instances are not relevant to a determination of this case.

Frequently photographic identifications are conducted at the initial stage of the investigation prior to the time suspicion has focused on a particular witness. They do not involve an immediate personal confrontation between the accused and the witness which for all intents and purposes determines the accused's guilt. The grand jury is a separate procedure provided for by both the Fifth Amendment to the United States Constitution and Article 1, Section 7 of the 1970 Illinois Constitution and has its own unique historical development. The risk that the absence of counsel would derogate from the accused's right to a fair trial is not the same as in an identification confrontation. The grand jury merely determines whether there is a probable cause to prosecute the suspect. Furthermore, the defendant may assert his privilege against self incrimination before the grand jury, and it is very rare in Illinois that the accused is ever even called before that body. A court reporter is present at the grand jury proceedings in Illinois to keep a record of what occurs and the proceedings themselves are secret and cannot be used at trial. (Ch. 38, §112-6, Ill.Rev.Stat. 1969). Certainly defense counsel is not entitled to be present when the State is interviewing its witnesses in the course of trial preparation or in the course of a police investigation.

Contrary to the State's argument (pp. 14-15), *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) and *Miranda* v. *Arizona,* 384 U.S. 436 (1966), where the Court applied the right to counsel to pre-indictment interrogations, are not dis-

tinguishable from the case at bar on the ground that those cases involved Fifth Amendment rather than Sixth Amendment rights. This Court in *Wade* held that no distinction should be drawn between Fifth and Sixth Amendment rights:

> "Of course, nothing decided or said in the opinions in the cited cases links the right of counsel only to protection of Fifth Amendment rights. Rather those decisions 'no more than reflect a constitutional principle established as long ago as *Powell* v. *Alabama*. . . .' *Massiah* v. *United States, supra,* at 205. It is central to that principle that in addition to counsel's presence at trial, *the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.* The security of that right is as much the aim of the right to counsel as it is of the other guaranties of the Sixth Amendment . . . The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution. Cf. *Pointer* v. *Texas,* 380 U.S. 400.' 388 U.S. at 226-227. (Emphasis supplied)

The Illinois rule that counsel is not required at a pre-indictment show-up violates both the spirit and the letter of this Court's decisions in *Wade* and *Gilbert.* The California rule as announced in *People* v. *Fowler,* 1 Cal. 3d 335, 361 P. 2d 643 (1969), correctly applies the law. Any other ruling would make a sham of *Wade* and *Gilbert.*

> "The pre-indictment post-indictment dichotomy would leave the police in the position to manipulate the applicability of the right to counsel by holding all identification procedures before the indictment, thus defeating the aim of *Wade* and *Gilbert.* The test is too

mechanical and it elevates form over substance." Comment, *The Right to Counsel in Lineup,* 36 U. of Chi. L. Rev. 830 (1969).

III.

The Presence of Counsel was Essential to Assure Petitioner a Fair Trial.

While recognizing that prejudice may occur at an eyewitness confrontation, the State, nonetheless, urges that counsel is not useful at such confrontations. (Brief, pp. 30-43; Cal. Brief, pp. 8-10.) The State fails to recognize that in the case at bar counsel would have served a meaningful function. The confrontation in this case was critical. At trial, Shard identified petitioner and Bean not as the men who robbed him, but as the men he saw at the police station. (A. 21.) As a result of the station house showup, Shard came to associate the men who robbed him with the men pointed out to him at the showup. No amount of cross-examination by defense counsel could remove this prejudice.

Counsel's function in this case therefore would have been much more than that of a mere observer. Counsel could have objected to the prejudicial and suggestive manner in which Shard was asked to point out his attackers.* As the police have no interest in convicting an innocent man, it can be assumed that they would have cooperated with defense counsel if he suggested that a lineup rather than a showup be conducted. Had the police officers refused to cooperate, counsel could have

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* This court recognized in *Wade* that identification confrontations are particularly suggestive when the witness is told the police have caught the suspect and then is asked to point out the suspect alone. 388 U.S. at 233.

taken the matter up with their superiors or requested emergency relief from the Chief Judge of the Cook County Criminal Court. Even if counsel had been forced to assume a more passive role at the confrontation, this Court has recognized that his presence alone "can often avert prejudice and assure a meaningful confrontation at trial." *United States* v. *Wade*, 388 U.S. at 236.

That counsel might later be called as a witness to what transpired at the police station is no valid objection to having him present at the confrontation. Much the same argument can be made against having counsel present at police interrogations of the accused. If a conflict arises, counsel can always withdraw from the case. In Illinois, where there is a public defender system and an active section of the organized bar who represent indigent persons, the attorney who handles pretrial matters frequently does not represent the accused in the criminal trial itself. Counsel comes to the confrontation with his collective legal experience and knowledge of criminal law and proceedings so the accused is not forced "to stand alone" at what may be the most critical proceeding in the whole criminal process.

The State points to no facts in the case at bar to show how it could have been prejudiced by advising petitioner of his right to counsel. The crime had occurred two days earlier and petitioner was in custody at the police station for several hours prior to the time of the confrontation. The police had ample time to advise petitioner of his rights and secure counsel for him. This was not an immediate on-the-scene confrontation and no compelling circumstances prevented the police from informing petitioner of his rights. The police's failure to advise petitioner of his right to counsel prior to the pre-indictment showing deprived him of his right to a fair trial.

CONCLUSION

The decision of the Appellate Court of Illinois should be reversed and this cause remanded with instructions ordering petitioner's release or that he be afforded a new trial at which all identification testimony is excluded.

Respectfully submitted,

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